United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-7476

To be argued by Osmond K. Fraenkel

B

P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NEWBURGER, LOEB & CO., INC., as Assignee of Claims of David Buckley and Mary Buckley,

Plaintiff-Appellant - Cross Appellee

-against-

CHARLES GROSS, MABEL BLEICH, GROSS & CO., and JEANNE DONOGHUE,

Defendants-Appellees - Cross Appellants

NEWBURGER, LOEB & CO., a New York limited partnership, ANDREW M. NEWBURGER, ROBERT L. NEWBURGER, RICHARD D. STERN, WALTER D. STERN and ROBERT L. STERN, as Executors of the Estate of Leo Stern, ROBERT L. STERN, RICHARD D. STERN, JOHN F. SETTEL, HAROLD J. RICHARDS, SANFORD ROGGENBURG, HARRY B. FRANK and JEROME TARNOFF, as Executors of the Estate of Ned D. Frank, FRED KAYNE, ROBERT MUH, PAUL RISHER, CHARLES SLOANE, ROBERT S. PERSKY, FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG & GRUTMAN, a partnership (formerly known as Finley, Kumble, Heine, Underberg & Grutman) and LAWRENCE J. BERKOWITZ,

Additional Defendants on Counterclaims - Appellants Cross Appellees

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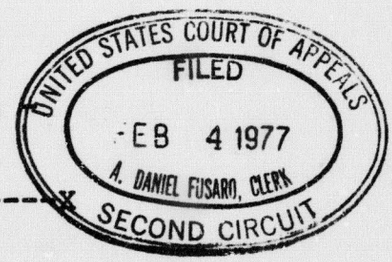
Docket No. 76-7476 and the following related appeals:

76-7486
76-7488
76-7489
76-7494
76-7495
76-7499
76-7500



BRIEF ON SUBJECT OF JURISDICTION FOR PLAINTIFF AND VARIOUS COUNTERCLAIM DEFENDANTS AS APPELLANTS OTHER THAN FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG & GRUTMAN, AND FOR CERTAIN COUNTERCLAIM DEFENDANTS AS APPELLANTS ON THE EVIDENCE.

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INDEX TO BRIEF OF APPELLANTS
NEWBURGER, LOEB & CO., ET AL.

Cases Cited

To be argued by
Osmond K. Fraenkel

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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BRIEF ON SUBJECT OF JURISDICTION FOR PLAINTIFF AND VARIOUS COUNTERCLAIM DEFENDANTS AS APPELLANTS OTHER THAN FINLEY, KUMBLE, WAGNER, HEINE, UNDERBERG & GRUTMAN, AND FOR CERTAIN COUNTERCLAIM DEFENDANTS AS APPELLANTS ON THE EVIDENCE.

Plaintiff and most of the counterclaim defendants have appealed from a judgment rendered after trial before

Judge Owen in the Southern District. His opinion is not yet reported. The judgment appealed from awarded defendant-appellee Gross $337,921 with interest and costs and defendants-appellees Bleich and Donoghue each $58,368.75 with interest and costs on the First, Second, and Fourth Counterclaims against all appellants, and awarded Gross $134,171.75 and $50,000 punitive damages against certain of the appellants on the Third Counterclaim.

THE ISSUES

I. The District Court had no jurisdiction to consider Gross's challenge of the validity of the 1971 transfer by the partnership to the corporation since he was no longer a partner and therefore had no standing to make the challenge.

II. The District Court had no jurisdiction of any of the counterclaims insofar as they rested on the alleged invalidity of the 1971 transfer by the partnership to the corporation.

III. The District Court had no jurisdiction of the Second or Fourth Counterclaims.

IV. The District Court had no jurisdiction of Gross's claim for alleged conversion.

V. There is no substantial evidence that any of the Newburger, Loeb defendants were party to any conspiracy.

STATEMENT OF THE CASE

This action was commenced in 1971 by Newburger, Loeb & Co., Inc. as assignee of Newburger, Loeb & Co., a partnership, on claims assigned to the partnership by two Buckleys against appellees Gross and Bleich, charging that their accounts with the firm of Gross & Co., in which Gross and Bleich had been partners, had been churned between 1962 and 1966 to their damage. Gross, Bleich and Donoghue* then filed nine counterclaims against plaintiff and additional defendants, all of which related to acts which had occurred in 1970 or 1971. These defendants consisted of the partnership of Newburger, Loeb & Co. (predecessor of the corporation), most of its partners, a number of other persons, and a law firm that had acted for some of them. Judge Ward on motions for summary judgment (365 F. Supp. 1364) ruled that the Court had jurisdiction of the First, Second, and Fourth as compulsory counterclaims under FRCP §13(a), and of the Ninth as based on an independent federal ground, but that the others were available only as offsets. Judge Owen granted judgment on the First, Second, and Fourth Counterclaims and dismissed the Ninth on the merits. As he dismissed plaintiff's claim on the merits, he did not deal with the setoff counterclaims.

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*Just how Jeanne Donoghue became a party is unclear.

The First Counterclaim (pars. 2-8, A.* 32,33), also listed as a Second Defense, sought damages against these appellants and others on the ground that they participated in the transfer of the business of Newburger, Loeb & Co., the partnership, to Newburger, Loeb & Co. Inc., the corporation, in 1971 without the consent of all the general and limited partners, and that this violated New York Partnership Law §98. While this was not spelled out in the pleading, the reference was to Gross (who had been a general partner but had withdrawn months before the transfer) and Bleich and Donoghue (who were limited partners).

The Second Counterclaim (pars. 15-49, A.* 34-43), listed also as a Fourth Defense, incorporated the allegation in the Second Defense and First Counterclaim that the transfer agreement violated New York's Partnership Law and the allegation in the Third Defense that the agreement was fraudulent because induced by special considerations given to certain parties. It then went on to allege details with regard to the Buckley accounts which formed the basis of the churning claim, details with regard to the Gross capital account, the formation of the corporation, and charged that the claim which formed the basis of the complaint was inspired in order to force Gross to agree to the transfer (which he, as we shall show, as a withdrawn partner had no right to object to). The conclusion was that plaintiff is estopped from asserting the claim of churning

References A are to the separately numbered pages of the pleadings and other court papers.

and that plaintiff and the counterclaim defendants are "Constructive Trustees" liable to account and pay damages.

This Second Counterclaim is a hybrid. Allegations which might be a defense to the churning claim (such as the history of the Buckley accounts and the claim of estoppel) are mixed with allegations which might be a basis for a counterclaim (such as the violation of Section 98). But the first allegations form no basis for a counterclaim and the second no basis for a defense, as we shall show in Point II. The two should not have been put into one pleading.

Judge Ward held both these to be "compulsory" counterclaims under Rule 13 because, he said, they were closely linked to the defense of plaintiff's claim (365 F. Supp. at 1367). He also ruled that the transfer violated the New York statute and sent the case to trial on the issue of damages.

The Fourth Counterclaim (pars. 60-64, A.* 45-47), not listed as a Defense, repeated the allegations of the Fourth defense and the Second Counterclaim and (like the Second) challenged the motives of plaintiff in bringing the suit and alleged a conspiracy to compel Gross to consent to the transfer to the corporation. Judge Ward held it to be compulsory because it alleged acts which were a defense to plaintiff's claim (id.).

All appellants question the correctness of Judge Ward's rulings with respect to jurisdiction and Partnership Law,Section 98, and of Judge Owen's rulings with respect to the existence of a conspiracy and to damages. But this brief will confine itself to the issue of the Court's jurisdiction, since other appellants are briefing the other issues, and also to a discussion of the evidence insofar as it relates to the partnership and the five individual members of the firm the undersigned alone represents, and the sixth, Leo Stern, who died before the trial and whose executors were substituted and are represented by us also.

POINT I

THE DISTRICT COURT HAD NO JURISDICTION TO CONSIDER GROSS'S CHALLENGE OF THE VALIDITY OF THE 1971 TRANSFER BY THE PARTNERSHIP TO THE CORPORATION SINCE HE WAS NO LONGER A PARTNER AND THEREFORE HAD NO STANDING TO MAKE THE CHALLENGE.

Before January 1, 1969, when Gross became a partner of Newburger, Loeb & Co., he had his own firm, Gross & Co. The complaint in this case rested on alleged churning by Gross & Co. in the accounts of the Buckleys between 1962 and 1966 in violation of the S.E.C. laws (A.* 2-9).

Since Newburger, Loeb & Co. cleared for Gross & Co., the Buckleys became customers of Newburger, Loeb & Co.

(A. 63). As a result of the collapse of Westec stock the Buckleys became heavily indebted fo Newburger, Loeb & Co. (A. 80). As part of the settlement of that claim they assigned their churning claim to the partners and it was included in the 1971 transfer to the corporation (A.111).

Gross withdrew from Newburger, Loeb & Co. in the fall in 1970 (A. 2293).

In February 1971 the partnership of Newburger, Loeb & Co. was in serious financial difficulties and was threatened with suspension by the New York Stock Exchange unless additional capital was forthcoming (A. 1132). To prevent this, Newburger, Loeb & Co. Inc. was organized and the business of the partnership was turned over to it on February 11, 1971, new capital was provided, and the business continued. That transaction was approved by all the general and limited partners of Newburger, Loeb & Co. except Bleich and Donoghue (A.*525). Gross was no longer a partner, having withdrawn in September 1970. Under the terms of the partnership agreement he was entitled to have his capital determined according to a certain formula and to have it paid twelve months after his withdrawal (Ex.443). Thus in February 1971 he had no present right of any kind.

Nevertheless, in the First Counterclaim he alleges that the failure to obtain the consents of Bleich and Donoghue violated New York's Partnership Law, Section 98, and gave him a defense to the churning claim asserted in the complaint. The same idea permeates the Second and Fourth Counterclaims.

We submit that Gross had no standing to complain of the alleged violation of Section 98. The transfer from the partnership to the corporation deprived Gross of nothing. Indeed, it probably gave him a claim for the return of his capital against the corporation as well as against the partnership and the individual partners.

It is elementary that no one can claim the benefit of a right given to someone else. That principle is, perhaps, most dramatically illustrated in cases arising under the Fourth Amendment. It is settled law that a person cannot complain of the unlawful seizure of someone else's property, no matter how incriminating that property might turn out to be.

Alderman v. United States,
394 U.S. 165 (1969);

Brown v. United States,
411 U.S. 223 (1973);

United States v. Delguyd,
542 F.2d 346 (6th Cir. 1976 -
Advance Sheet of 11/29/76)

The same rule has been applied to challenges to zoning laws, to impairment of the environment, and to civil rights cases:

> Warth v. Seldin, 422 U.S. 490 (1975);
> Evans v. Lynn, 537 F.2d 571 (2d Circ. 1976), cert. den. January 17, 1977, sub n. Evans v. Hills, 45 U.S.L.W. 3489
>
> Sierra Club v. Morton, 405 U.S. 727 (1972)
>
> Tyler v. Ryan, 419 F. Supp. 905 (E.D. Mo. 1976 - Advance Sheet of 11/29/76)

If the violation of such fundamental rights cannot be challenged by third persons, surely the violation of this non-criminal New York statute cannot be challenged by Gross.

And if he cannot challenge the transfer to the corporation, there is no basis for any claim that its invalidity affected the assignment of the churning claim by the partnership to the corporation or constituted a defense to it. Lack of standing is a jurisdictional bar because of Art. III of the United States Constitution which limits the judicial power to "cases" and "controversies." See United States v. Richardson, 418 U.S. 166, at 179 (1974).

Consequently, the District Court had no jurisdiction of any claim by Gross resting on the alleged violation of New York Partnership Law, Section 98.

POINT II

THE DISTRICT COURT HAD NO JURISDICTION OF ANY OF THE COUNTERCLAIMS INSOFAR AS THEY RESTED ON THE ALLEGED INVALIDITY OF THE 1971 TRANSFER BY THE PARTNERSHIP TO THE CORPORATION.

Regardless of Gross's standing to challenge the validity of the assignment, the claim of its invalidity is no defense to the churning claim and can form no basis for any counterclaim by Gross, Bleich, or Donoghue. To hold that the partners violated Section 98 in selling the business could at most accelerate their claims for the return of their capital. The 1971 transfer could not be set aside. Indeed, as Judge Ward ruled (265 F. Supp. at 1370), that was clearly not feasible and he there recognized that defendants' claims were for money damages. How such claims could be transmuted into a defense to the churning action is nowhere explained.

Judge Ward was, therefore, in error when he ruled that any of the counterclaims supported a defense to the churning action, at least insofar as they rested on the alleged violation of Section 98. (We shall deal with the other aspects of the Second and Fourth Counterclaims in a later point.)

Judge Ward relied on this Court's decision in United States v. Heyward-Robinson Company, 430 F.2d 1077. But that case does not support him. There the complaint sought to recover moneys due a subcontractor from the prime contractor and its surety for work done by the subcontractor on a federal job. The prime contractor counterclaimed against the subcontractor for overpayments on that job and on a non-federal job as well. This Court held there was such a connection between the two contracts as to make the counterclaim on the non-federal job compulsory. In reaching that conclusion (p. 1081) it stressed the fact that the contracts were between the same parties for the same type of work over the same period, that the prime contractor had the right to terminate both subcontracts for default in either and had the right to withhold moneys due on one to apply to the other, and that both jobs were covered by a single insurance policy. Moreover, the claims were "so interwoven" that separation was not possible.

There is nothing in the least comparable in the case at bar. The liability of Gross and Bleich for the alleged churning between 1962 and 1966 by Gross's own firm before he joined Newburger, Loeb & Co. in 1969 had nothing whatever to do with the right of Newburger, Loeb & Co. to transfer its assets to the corporation in 1971. Newburger, Loeb & Co. and

the various other counterclaim defendants had nothing whatever to do with the activities of Gross & Co. except that Newburger, Loeb & Co. cleared its transactions and that some of the individual counterclaim defendants were members of the firm of Newburger, Loeb & Co. during that period. Other counterclaim defendants, such as Richard D. Stern, John F. Settel, Sanford Roggenburg, Ned D. Frank, Fred Kayne and Charles Sloane,did not become members of that firm until 1969 or 1970 (Ex.413). Still other counterclaim defendants, Alex Aitala, Robert Muh, Paul Risher and Lawrence J. Berkowitz, were never members of Newburger, Loeb & Co. (A.107,2705).And Robert S. Persky and the Finley, Kumble law firm had had nothing to do with Newburger, Loeb & Co. between 1962 and 1966 (S.M. 1415; A. 1078).

Moreover, the First Counterclaim could not possibly be a defense to the claim of churning since it related to events in late 1970 and early 1971, years after the alleged churning had ended. Indeed, the only defense to the claim of churning would be that the customers involved had controlled their accounts. And it was on that ground, not on any of the matters that were raised in the counterclaim, that Judge Owen dismissed the churning claim (A.* 513).

The complaint rested on claimed violations of the S.E.C. laws, the counterclaim on alleged violation of a New

York statute, Partnership Law, §98, that regulated partnerships but had nothing to do with restrictions on trading. Not a single bit of evidence was common to both. Nor were there any common questions of law.

The First Counterclaim cannot be held compulsory.

The criteria for determining whether counterclaims are compulsory under FRCP §13(a) were reviewed by the Tenth Circuit in Pipeliners Local Union No. 798 v. Ellerd, 503 F.2d 1193 (10th Cir. 1974). The Court said (p. 1198):

> "It has been said that most courts, rather than attempting to define the key terms of Rule 13(a), supra, precisely, have preferred to suggest standards by which the compulsory or permissive nature of specific counterclaims may be determined: (1) Are the issues of fact and law raised by the claim and counterclaim largely the same? (2) Would res judicata bar a subsequent suit on defendants' claim absent a compulsory counterclaim rule? (3) Will substantially the same evidence support or refute plaintiff's claim as well as defendants' counterclaim" and (4) Is there any logical relation between the claim and the counterclaim? See Wright and Miller, Federal Practice and Procedure, Civil §1410, Ch. 4, p. 42 and cases cited . . ."

Not one of these four criteria applies here. The issues of fact and law are entirely different; a decision on neither claim would be res judicata in an action on the other; none of the evidence is common to both claims, and there is no logical connection between them.

See also Lucerne Products, Inc. v. Skil Corporation, 441 F.2d 1127 (6th Cir. 1971), where the Court held that a claim for goods sold and delivered was not a compulsory counterclaim to a claim for infringement of a patent although the parties were the same, and Beach v. KDI Corporation, 490 F.2d 1312 (3d Cir. 1974), where it was held that the Court had no jurisdiction of a counterclaim based on plaintiff's alleged indebtedness to a corporation when interposed in a suit which challenged the corporation's ouster of plaintiffs as its officers and directors. The Court stressed the fact that the complaint there, as is the case here, alleged violation of federal laws and that the counterclaim rested on state law only.

The subject was recently fully reviewed in Sue & Sam Mfg. Co. v. B-L-S Constr. Co., 528 F.2d 1048 (4th Cir. 1976). In a suit brought against the owner of a building to recover damages due to the leakage of rain, the owner filed a third party complaint against the tenant. The tenant counterclaimed for damage to it resulting from the rain leak and also for damage due to the collapse of the roof after a snowstorm several years earlier. The Court ruled that the tenant's claim with regard to the rain was a compulsory counterclaim but that the claim with regard to the snow damage was not because that was not the subject of the third party complaint.

In reaching this conclusion the Court considered each of the four criteria we have quoted. See also Marin City Council v. Marin City Redevelopment Agency, 416 F. Supp. 700, at 707 (N.D. Cal. 1975).

In sum, the First Counterclaim rested on a wholly independent non-federal cause of action. Had it been made the subject of a suit in the state court, it could not possibly have been urged there that the state court had no jurisdiction because the claim should have been asserted here. And to the state court appellees should be relegated to assert their claims that the state statute has been violated. The judgment based on the alleged illegal transfer should be reversed for lack of jurisdiction.

POINT III

THE DISTRICT COURT HAD NO JURISDICTION OF THE SECOND OR FOURTH COUNTERCLAIMS.

The cases cited in Point II and arguments there made apply here as well.

Despite all the verbiage in these two counterclaims, they amount to nothing more than an attack on the motives which lay behind the institution of the suit on the churning claim. Judge Ward's statement (id. at 1367) that these

alleged acts could constitute defenses to that churning claim is clearly wrong. For it is well settled that the motive of a plaintiff in bringing a law suit is no defense. See 1 Corpus Juris Secundum, Actions, §24, pp. 1064, 1065.

Such is the law in both the courts of New York and the Southern District.

In TNT Communications, Inc. v. Management Television System, Inc., 32 A.D.2d 55 (1st Dept. 1969), aff'd. 26 N.Y.2d 639 (1970), a defense was interposed which, among other things, challenged the motive of plaintiff in bringing the suit. The defense was held good at Special Term. But the Appellate Division reversed and dismissed the defense, saying at page 58:

> "T he ulterior motives and purposes of plaintiff, if any, in bringing the suit are immaterial if, as alleged by it, defendants have wrongfully appropriated its valuable trade secrets."

And in Southern Music Publishing Co. v. Seeco Records, Inc., 200 F. Supp. 704 (S.D.N.Y. 1960), Judge Murphy granted summary judgment overruling a contention that the suit had been brought to harass defendant and destroy its business and good will. He said at page 705:

> "The short answer to this defense is that if plaintiff has a valid cause of action, what its purpose is in pursuing it is of no moment in this proceeding."

This subject was discussed in Blank v. Sullivan & Cromwell, 418 F. Supp. 1 (S.D.N.Y., Advance Sheet, 10/25/76), where Judge Motley said:

> "The court's ruling that the motive of plaintiff in bringing the action is irrelevant is consistent with well-settled law. NAACP v. Button, 371 U.S. 415, 83 S. Ct. 328, 9 L. ed.2d 405 (1962); Evers v. Dwyer, 358 U.S. 202, 79 S. Ct. 178, 3 L.Ed. 2d 222 (1958); Lea v. Cone Mills, 301 F. Supp. 97 (M.D.N.C. 1969), aff'd. 438 F.2d 86 (4th Cir. 1971)."

The judgment in favor of Gross, Bleich and Donoghue should be reversed insofar as it rested on the Second or Fourth Counterclaim.

POINT IV

THE DISTRICT COURT HAD NO JURISDICTION OF GROSS'S CLAIM FOR ALLEGED CONVERSION.

The judgment (A.* 539) includes an award of $134.171.75 with interest in favor of Gross against certain of the counterclaim defendants for conversion of his securities. This conversion was referred to in the Third Counterclaim (pars. 57-59, A.*44-45) but not in any of the others. It will be recalled that Judge Ward had ruled that the court had no jurisdiction of this (and several other) counterclaim as it was "not logically related to the plaintiff's cause of action" (365 F. Supp. at 1367) and allowed it only as a setoff, and

that Judge Owen indicated (footnote 11) that he was not considering any of the setoff counterclaims.

Yet by indirection he did that very thing by the device of amending the pleadings to conform to the proof (footnote 36, A.* 536), thus in effect overruling Judge Ward.

Regardless of all other considerations in this case it is impossible to see any connection between conversions of securities alleged to have occurred in 1970 or 1971 with the churning claim alleged in the complaint, based on transactions which occurred between 1962 and 1966.

So much of the judgment in favor of Gross should be reversed.

POINT V

THERE IS NO SUBSTANTIAL EVIDENCE THAT ANY OF THE NEWBURGER DEFENDANTS WERE PARTY TO ANY CONSPIRACY.

In considering the evidence against the Newburger, Loeb defendants whom undersigned counsel represent, Andrew M. Newburger, Robert L. Newburger, Richard D. Stern, Robert L. Stern and Walter D. Stern, as Executors of the Estate of Leo Stern, deceased, and Sanford Roggenburg, this Court must first recognize the peculiar character of Judge Owen's opinion.

One's first impression on reading it must be that a group of people decided to grab for themselves the very profitable business of Newburger, Loeb & Co., the partnership, for the purpose of doing Gross, Bleich, and Donoghue out of moneys to which they were entitled. The palpable fact that the transfer by the partnership to the corporation was necessitated by bleak economic necessity and was the only way to prevent the liquidation of the business, is mentioned but really ignored. Before considering any of the aspects of the case it must, at all times, be kept in mind that the transfer to the corporation on February 11, 1971 occurred to prevent the suspension of the partnership by the New York Stock Exchange which, without that transfer, would have occurred at the opening of the Exchange the next morning (S.M. 1470, 1471, A.1132,33). It was a salvage operation, not, as Judge Owen seems to imply, a grab. Any pressures that may have been exerted by anyone on Gross, Bleich, or Donoghue were not to injure them but to ensure that the continuation of the business might take place without the disaster of litigation. Unfortunately that did not succeed, so we have this lawsuit and this appeal.

Against that brief background summary, let us consider whether there is any substantial evidence that any of the Newburger, Loeb defendants conspired to injure Gross, Bleich, or Donoghue. Obviously the partnership itself cannot

be held party to a conspiracy unless at least a substantial number of the individual partners themselves conspired and did so in the interest of the partnership, rather than in their own interest. So let us consider what the record shows with regard to the actions of the principal partners: Andrew and Robert Newburger, Richard, Robert, and Leo Stern.

It is difficult to understand how Judge Owen came to the conclusion that any of these persons entered into the conspiracy he concluded had been formed by the "new team" to coerce Gross, Bleich, and Donoghue into agreeing to the 1971 transfer by the partnership to the corporation.

There is no evidence that any of those persons participated in any of the threats referred to in the opinion or that they had anything to do with the institution of the law suit against Gross and Bleich.

All the record shows is that each of them signed the transfer agreement (S.M. 138, A. 60) and had either directly or indirectly agreed to the February 1971 closing. There is also testimony that one of them, Andrew M. Newburger, had been informed that the Rosenman firm had refused to issue an opinion letter (S.M. 3382, 3283, A.2115,16).Their concurrence in the closing merely showed their willingness to accept Mr. Persky's opinion that the transfer was valid, a position taken by counsel for other parties at the closing, including

representatives of firms such as Willkie, Farr & Gallagher (S.M. 897, A. 633; S.M. 935, A. 671), Stroock & Lavan (S.M. 985, A. 712; S.M. 1001, A. 728), and others (S.M. 1011, A. 738). Their participation in the transfer does not show any intention to injure Gross, Bleich, or Donoghue in any way. Appellants' actions were motivated by a desire to prevent the firm from being destroyed by the Stock Exchange as it would have been by the Exchange's suspension announcement due to be made on February 12, 1971.

Whatever responsibility these individuals or the partnership may have had toward Gross, Bleich, and Donoghue with respect to their respective capital accounts was a matter of partnership accounting in the state courts, not the subject of a compulsory counterclaim on the theory of conspiracy in the federal court.

CONCLUSION

The judgment in favor of Gross, Bleich, and Donoghue should be reversed on the ground that the District Court had no jurisdiction of any of the counterclaims on which the judgment rested or, in the alternative, the judgment against appellants Newburger, Loeb & Co., Andrew M. Newburger, Robert L. Newburger, Richard D. Stern, Walter D. Stern and Robert L. Stern, as Executors of the Estate of Leo Stern, deceased, and Sanford Roggenburg should be reversed and the counterclaims against them dismissed with prejudice on the ground that

there was no substantial evidence to implicate them in any conspiracy.

Respectfully submitted,

Osmond K. Frankel

OSMOND K. FRAENKEL
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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NEWBURGER, LOEB & CO., INC., as Assignee of Claims of David Buckley and Mary Buckley,

Plaintiff-Appellant - Cross Appellees

Docket No.76-7476

-against-

CHARLES GROSS, MABEL BLEICH, GROSS & CO., and JEANNE DONOGHUE,

Defendants-Appellees - Cross Appellants

and

NEWBURGER, LOEB & CO., etc., et al.,

Additional Defendants on Counterclaims - Appellants-Cross Appellees

----------X

STATE OF NEW YORK)
SS:-
COUNTY OF NEW YORK)

DOROTHY GANGEL, being duly sworn, deposes and says that she is not a party to this action, is over 18 years of age, and resides at 85-55 115th Street, Richmond Hill, N.Y.

That on February 4, 1977, deponent served two copies of the within brief on each of the following persons in this action at the addresses designated by said persons for that purpose by depositing true copies of same enclosed in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York:

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Dorothy Gangel
Dorothy Gangel

Sworn to before me this

4th day of February, 1977

Jacob B. Wallerstein

JACOB B. WALLERSTEIN
Notary Public, State of New York
No. 24-9513415 Qual.in Kings Co.
Certificate filed in New York County
Commission Expires March 30, 1978